Supreme Court, U.S.
FILED
031614 MAY 21 2004

No.

IN THE

Supreme Court of the United States

MIN JIN, PETITIONER

v.

METROPOLITAN LIFE INSURANCE COMPANY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Second Circuit affirmed the lower court's denial of Min Jin's motion to extend her time to file a notice of appeal as not an abuse of discretion, in reliance upon its decision in *Silivanch v. Celebrity Cruise, Inc.* 333 F. 3d 355 (2nd Cir. 2003). In *Silivanch*, the Second Circuit refused to agree with the lower court that a party's untimely notice of appeal was based upon excusable neglect – noting that a motion for relief from a late filing for excusable neglect will "rarely if ever favor a party who fails to follow the clean dictate of a court rule." *Id.* at 366. Jin's motion was based upon the combined circumstances of a) the judgment being forwarded to counsel from an old law office address at the time when counsel's support staff had left or was leaving together with b) the difficulties of consulting with a depressed client, who was without a telephone, about a decision to undergo a third appeal which could lead to a third trial.

In defeating Jin's motion on a standard that a party will "rarely if ever" prevail in the instance of clear rule, the Second Circuit is in conflict with this Court's equitable approach in *Pioneer Inv. Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993). Since *Pioneer*, all circuit courts have universally denied relief on grounds of excusable neglect.

The questions are presented:

1. Should *dicta* from *Pioneer Inv. Services Co. v. Brunswick Associates Limited Partnership*, 507 U.S. 380 (1993), be utilized by the Second Circuit

to obviate the plain language of Federal Rule of Appellate Procedure 4(a)(5) and universally deny relief to litigants who are negligent in missing the filing date for a notice of appeal?

2. Should the holding of this Court in *Pioneer*, to permit late filings on a case by case basis after the application of an equitable five point standard, be universally ignored by the Second Court to reject applications of late filings on a standard that a late filing is "rarely if ever" to be granted?

3. Should the Second Circuit deny discretion to the district courts to permit late filings pursuant to FRAP 4(a)(5) upon standards formulated in *Pioneer* by universally denying relief to negligent late filers?

4. Should the plain meaning of FRAP 4(a)(5) and this Court's decision in *Pioneer* be ignored by the Second Circuit in denying relief to negligent late filers?

PARTIES TO THE PROCEEDING

Min Jin was named as plaintiff-appellant in the lower court and is the petitioner in this case.

Metropolitan Life Insurance Company was named as defendant-appellee in the lower court and is the respondent in this case.

Greg Morabito was named as defendant in the lower court and is not a respondent in this case.

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OPINIONS BELOW

The opinion of the United States Court of Appeal for the Second Circuit is reported at *Jin v. Metropolitan Life Insurance Co.*, 88 Fed.Appx. 456, (2nd Cir. 2004). The Second Circuit affirmed the June 20, 2003, decision of the United States District Court for the Southern District of New York reported at *Jin v. Metropolitan Life Insurance Co.*, 2003 WL 21436211 (S.D.N.Y. 2003). *See* App., pp. 4a-16a.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Second Circuit's opinion was rendered on February 23, 2004. *See* App., pp. 1a-3a.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 1254(1) and Rule 4(a)(5) of the Federal Rules of Appellate Procedure. See App., pp. 17a -24a.

STATEMENT OF THE CASE

A. Prior Proceedings

1. The 2000 trial

Jin initiated an action against MetLife in 1995 alleging that her supervisor, Greg Morabito ("Morabito"), sexually harassed her in violation of Title

VII of the Civil Rights Act of 1964.

Jin v. Metropolitan Life Insurance, 295 F.3d 335, 338 (2nd Cir., 2002). A five-day trial commenced on September 21, 2000. At the conclusion of the trial, the jury returned with a verdict that Jin had been subjected to a hostile work environment and had been sexually harassed by Morabito. *Id.* at 338. However, after the lower court charged the jury that "stuffing Jin's paychecks into a drawer" for months constituted only a "temporary inconvenience," the jury found that the sexual harassment committed against Jin had not resulted in a tangible employment action. *Id.* at 338-339, 341, 344. Therefore, judgment was entered in favor of MetLife. *Id.* at 341.

2. Appeal of 2002 judgment

Upon appeal, the Second Circuit requested amicus briefs and asked the parties for additional briefs before its landmark sexual harassment holding that the jury instructions which related to tangible employment action were erroneous in three respects and each required a retrial. First, in respect to Morabito threatening to terminate Jin if she did not submit to sexual acts, the Second Circuit held that the jury should have been instructed to consider the "conditioning of her continued employment on her submission as a possible tangible employment action." *Jin* at 295 F.3d 349. Second, in regard to the district court's instruction that the withholding of Jin's paychecks for months be considered only a mere "inconvenience," *id.* at 341, the Second Circuit held that "the district court's instructions... constituted prejudicial error." *Id.* at 344, 351. Lastly, the Second

Circuit held that "the use of the term tangible adverse action was...a plain and fundamental error..." *Id.* at 352. As a result of its findings, the Second Circuit vacated the order of the district court granting judgment, and remanded for further proceedings consistent with its opinion.

3. Morabito's sexual harassment of Jin

In the 2000 trial, the jury determined unanimously that Jin was sexually harassed by her supervisor Morabito. The Second Circuit reviewed the evidence of Morabito's harassment of Jin as follows:

> From the evidence presented at trial, the jury could have found the following facts...[a]round May 1993, Morabito assumed duties at the Broadway branch, and by at least January 1994, Morabito was acting as Jin's manager and supervisor. From May 1993 to June 1994, Morabito engaged in a pattern of egregious conduct towards Jin that included (a) making numerous crude sexual remarks to her, both in the office and by calling her at home; (b) offensively touching Jin's buttocks, breasts, and legs on numerous occasions at the office, including when she was making sales calls at her desk and walking clients to the elevator; (c) requiring Jin, beginning in the summer of 1993, to attend weekly Thursday night private meetings in his locked office during which he would threaten her with a baseball bat, kiss, lick,

bite and fondle her, attempt to undress her, physically force her to unzip his pants and fondle him, push against her with his penis exposed, and ejaculate on her; and (d) repeatedly threatening to fire Jin if she did not accede to his sexual demands, as well as threatening her with physical harm. In February 1994, after months of submitting to the weekly sexual abuse out of fear of losing her job, Jin refused to attend another Thursday evening meeting with Morabito. Jin began working in the evenings and on weekends to avoid Morabito, but he continued to fondle and harass Jin when he saw her. Jin subsequently requested disability benefits due to the effects of the severe harassment. That request was never granted, and Jin was eventually fired by MetLife in October 1995. *Jin v. Metropolitan Life Insurance Co.*, 295 F.3d 335, 339 (2nd Cir. 2002).

4. The 2003 trial

Upon retrial - - notwithstanding that the first jury had already found in Jin's favor on the issues that she had been sexually harassed and subjected to a hostile work environment - - the district court ruled that the issues as to whether Morabito had sexually harassed Jin and subjected her to a hostile work environment had to be retried. *Jin v. Metropolitan Life Ins. Co.* 295 F3d 335 (2d. Cir. 2002). The district court also excluded evidence that MetLife had not disciplined Morabito after the 2000 verdict finding that he had

sexually harassed Jin. *Id.* The 2003 jury found that Morabito did not sexually harass Jin. *See* App., p. 5a.

5. Post-trial proceedings: year 2003

The jury verdict in favor of MetLife was rendered on March 14, 2003. *See* App., p. 5a. The judgment dismissing the complaint was signed on March 20. *Id.* The judgment was entered on the docket on March 25 and mailed to counsel by the clerk on March 26. *Id.* Jin's attorney filed a notice of appeal on April 25, 2003, one day beyond the 30-day deadline. *Id.* On May 16, 2003, Jin's attorney filed a motion for retroactive extension of time to file a notice of appeal. *Id.*

6. The opinion of the district court

In his opinion, Magistrate Judge Eaton set forth the background, in part, as follows: "Ms. Jin suffers from depression and is receiving Social Security disability benefits. Mr. Eikenberry has served as Ms. Jin's attorney throughout two appeals and two trials in this case."*Jin v. Metropolitan Life Insurance Co.*, 2003 WL 21436211, *1 (S.D.N.Y. 2003). In denying Jin's motion, Magistrate Judge Eaton set forth the circumstances in part as follows:

> Mr. Eikenberry and his office failed to calendar the deadline. He explains: A number of circumstances combined to interfere with the more or less smooth operation of my office during this period and in particular the handling of the calendaring of a notice of appeal date as follows:

a. I moved my offices from 63 Wall Street to 74 Trinity Place commencing on Friday, March 21, 2003, and

b. The move was not completed until Thursday March 27, and

c. On March 25, I terminated my secretary and a new secretary commenced on March 26, and

d. My associate Lisa Brubach resigned to accept another position and left on April 15, and

e. I had several deadlines the week of April 21 including an important letter hand delivered to Judge Carter on April 21, an appeal brief filed on April 23 and a post hearing arbitration brief filed on April 25, and

f. The files were not appropriately arranged until at least the end of April ... He goes on to say that, despite these problems, he would normally have filed on time, but Ms. Jin was "not easy to reach" and took a long time before "making the decision to appeal." *See* App., p. 11a.

Magistrate Judge Eaton characterized Jin's motion as based on "two reasons" for the delay. (1)

Jin's counsel " was changing secretaries and moving to a different building; in those circumstances he failed to calendar the appeal deadline, and he was unable to put his hands on the copies of the judgment mailed to him by me and by the docket clerk... (2) He and Ms. Jin had difficulty reaching a decision whether or not to appeal..." *Jin v. Metropolitan Life Insurance Co.*, 2003 WL 21436211, * 4 (S.D.N.Y. 2003). After examining each, Magistrate Judge Eaton denied Jin's motion. *See* App., pp. 8a-16a. Magistrate Judge Eaton did not examine the impact of the "two reasons" (App., pp. 10a-11a) operating together as was articulated in the affidavit supporting the motion. *See* App., p. 25a-30a.

B. The effects of sexual harassment on women

The year 2000 jury determined that Jin was sexually harassed by her supervisor Morabito. Sexual harassment affects the "physical, emotional, interpersonal, and career aspects of women's lives." Michele A. Paludi and Richard B. Barickman, *Academic and Workplace Sexual Harassment*, at p.27 (State University of New York Press 1991). The effects of this type of harassment materialize as physical and emotional stress reactions aptly named "Sexual Harassment Trauma Syndrome." *Id.* The response by women to sexual harassment usually includes "confusion, doubt, self-blame, and a desire to flee from the situation..." *Id.* at 34. "[T]he psychological impact of sexual harassment is related to the victim's perception and cognitive appraisals of her experiences." *Id.* at 32. "Women who have been harassed typically experience physical and emotional damage...they also suffer from a severe negative impact, which affects their educational and career advancement." *Id.* at 34.

"Research has indicated that women victims suffer long-term after-effects" [following acts sexual harassment.] *Id.* at 28. "Furthermore...victims experience a second victimization when they attempt to deal with the situation through legal...means." *Id.* at 27-28.

C. Jin's mental condition

In 1999, when Jin retained her current counsel, she was *pro se*, she appeared suicidal and she was virtually unemployable. *See* App., p.23a, 27a. However, "...[i]n June 2000 she obtained a job with a major bank..." and "...her supervisor's 7/24/00 e-mail praised her for doing 'the work of seven people'..." *Jin v. Metropolitan Life Insurance Co.*, 2000 WL 1781655, *3 (S.D.N.Y. 2000). However, because of the time she took away from her employer to participate in the 2000 trial, she lost her job and again became unemployed. *Id.* At the time of the second trial in 2003, she was unemployed and receiving Social Security disability benefits because of depression. *Jin v. Metropolitan Life Insurance Co.*, 2003 WL 21436211, *1 (S.D.N.Y. 2003).

REASONS FOR ALLOWANCE OF THE WRIT

This court's guidance is obviously warranted since the Second Circuit, notwithstanding the *Pioneer* decision in 1993, has uniformly denied every movant's right to extend the time to file an appeal upon grounds of excusable neglect. The Second Circuit discussed the 1993 *Pioneer* decision as setting the standard as follows:

> In *Pioneer*, the Supreme Court referred to "excusable neglect" as an "elastic concept," . . . implying a determination that is "at bottom an equitable one, taking account of all relevant circumstances surrounding the party's omission," *id.* at 395 . . . Factors to be considered in evaluating excusable neglect include "[1] the danger of prejudice to the [non-movant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was in the reasonable control of the movant, and [4] whether the movant acted in good faith." *Id.* at 366.

This adoption of the *Pioneer* standard has been "lip service." The Second Circuit itself has adopted a "rarely if ever" standard of denying motions to extend the time appeal as follows:

> But despite the flexibility of "excusable neglect" and the existence of the four-factor test in which three of the factors usually weigh in favor of the party seeking the extension, we and other circuits have focused on the third factor: "the reason for the delay, including whether it was within the reasonable control of the movant." *Pioneer*, ... We have noted that the equities will rarely if ever favor a party who "fail[s] to follow the clear dictates of a court rule" and held that where "the rule is entirely clear, we

> continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* test." *Id.* at 366-367.

Whether an extension of time should be granted upon an untimely filing of a notice of appeal, when a party has filed late through pure negligence, is a very important question, implicating one of the essential elements of our legal system - access to the judicial process, upon which the circuit courts are in disagreement with a decision of this Court and upon which this Court's guidance is urgently warranted. The leading case on the subject of late filing based on "excusable neglect" is *Pioneer Investment Serv. Co. v. Brunswick Associates Ltd. Partnership et. al.*, 507 U.S. 380 (1993). Since *Pioneer*, none of the thirteen circuit courts of appeal, including the Second Circuit in this case, has accepted a late filing of a notice of appeal where the failure to act was a result of "excusable neglect." *Id.* at 380. The Second Circuit's standard is "rarely if ever," if the rule is clear. (*See, Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355 (2d Cir. 2003). The Second Circuit standard is representative of standards in most other circuits despite the equitable standard established in *Pioneer*.

The following are the leading and most commonly cited decisions from the respective circuit courts which have refused to grant an extension of time for untimely appeals, based on excusable neglect: *Graphic Communications International Union, Local 12-N v. Quebecor Printing Providence, Inc.*, 270 F.3d 1 (1st Cir. 2001), *Silivanch v. Celebrity Cruises, Inc.*, 333 F.3d 355 (2d Cir. 2003), *Thompson v. E.I. DuPont de*

Numours & Co., 76 F.3d 530 (4th Cir. 1996), *Halicki v. Louisiana Casino Cruises, Inc.*, 151 F.3d 465 (5th Cir. 1998), *Hess v. Black River Petroleum, Inc.*, 209 B.R. 79 (6th Cir. 1997), *Prizevoits v. Indiana Telephone Company*, 76 F.3d 132 (7th Cir. 1996), *Lowry v. McDonnell Douglas Corporation*, 211 F.3d 457 (8th Cir. 2000), *Kyle v. Campbell Soup Company*, 28 F.3d 928 (9th Cir. 1994), *Advanced Estimating System, Inc. v. Riney*, 130 F.3d 996 (11th Cir. 1997).

The following is a list of leading decisions from the other circuit courts in which the circuit court in question granted an extension of time, based on excusable neglect: *In re: Vitamins Antitrust Class Actions*, 327 F.3d 1207 (D.C. Cir. 2003), *In re Cendant Corporations Prides Litigation v. Cendant Corporation*, 235 F.3d 176 (3d Cir. 2000), *City of Chanute, Kansas v. Williams Natural Gas Company*, 31 F.3d 1041 (10th Cir. 1994). However, the decisions within the D.C. and Tenth Circuits did not address "untimely" appeals. The D.C. Circuit decision granted an extension of time on a motion to modify a final order (the order contained an error in party names), where the original appeal had been timely. The Tenth Circuit decision granted an extension of time in order to file an amended notice of appeal, where the original notice of appeal had been timely. The decision from the Third Circuit granted an extension of time for an untimely proof of claim based on "excusable neglect," but where the delay was found to be outside of the attorney's reasonable control.

Since *Pioneer*, there does not appear to be one circuit court case in the country which has granted an extension of time to file a notice of appeal based upon

excusable neglect, *i.e.*, circumstances within the control of the party or the party's attorney - - but which circumstances excuse the late filing.

Introduction to argument

Rule 4 (a) (5) of the Federal Rules of Appellate Procedure provides that:

> The District Court may extend the time to file a notice of appeal if (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

As the Advisory Committee Notes for the 2002 amendments to this rule verify, a distinction exists between excusable neglect and good cause. The good cause standard is utilized in situations that are absent of fault. The excusable neglect standard is applied to situations involving fault. Advisory Committee Notes to Fed. R. App. P. 4, Subdivisions (a)(5)(A)(ii), 2002 Amendments. Jin seeks an extension on grounds of excusable neglect.

In *Pioneer Inv. Services Co. v. Brunswick Ass'n. Ltd. Partnership*, 507 U.S. 380 (1993), this Court enunciated a four factor test to aid in determining if excusable neglect is present. A court may consider: (1) the risk of prejudice to the nonmoving party; (2) the length of the delay and its potential impact on judicial proceedings; (3) the reason for the delay, including

whether it was within the reasonable control of the movant; and (4) whether the movant acted in good faith. *Id* at 395.

In its written opinion and order, the district court determined that the first, second and fourth *Pioneer* factors weighed in favor of Jin. *See*, App., p.10a. The only debated issue below was the third factor which deals with the reason for the delay.

The Argument

POINT I

BECAUSE FRAP RULE 4(a)(5) ALLOWS AN EXTENSION OF TIME IN CIRCUMSTANCES OF EXCUSABLE NEGLECT, THERE IS A QUESTION AS TO WHETHER JIN WAS ENTITLED TO AN EXTENSION BASED ON COUNSEL'S NEGLECT

Since Rule 4(a)(5) permits an extension in circumstances of neglect, should Jin have been granted an extension under a FRAP 4(a)(5), under the combination of circumstances of her counsel having to effectively communicate about a difficult decision with a depressed person who had no telephone, during a period when his law office moved, and he lost his legal and support staff ? *Pioneer Inv. Services Co. v. Brunswick Ass'n. Ltd. Partnership*, 507 U.S. 380 (1993). The Second Circuit determined in *Silivanch v. Celebrity Cruise, Inc.* 333 F.3d 355 (2nd Cir. 2003)(relied upon in this case) that since the rule was clear, the negligence of counsel was irrelevant, reasoning that a motion will "rarely if ever" be granted in the instance of

a clear rule. Thus, the Second Circuit has removed the criteria of negligence or mistake from the excusable neglect standard - - a contradiction - - necessitating this Court's attention to address the standard it sought to have established in *Pioneer*.

Neglect is defined as "to give little attention or respect" or "to leave undone or unattended to especially through carelessness." *Webster's Ninth New Collegiate Dictionary*, 791 (Merriam-Webster Inc. 1983). "Courts properly assume, absent sufficient indication to the contrary, that Congress intends the words in its enactments to carry 'their ordinary, contemporary, common meaning.'" *Pioneer* at 507 U.S. 388, quoting *Perrin v. United States*, 444 U.S. 37, 42 (1979). "Congress plainly contemplated that the courts would be permitted...to accept late filings caused by inadvertence, mistake, or carelessness..." *Id.* Furthermore, " to exclude every instance of an inadvertent or negligent omission would ignore the most natural meaning of the word 'neglect' and would be at odds with the accepted meaning of that word in analogous contexts." *Id.* at 394-395. *See also, United States v. Boyle*, 469 U.S. 241, 245 (1985).

In the *Pioneer* case, creditors of a Chapter 11 debtor sought an extension of time based on excusable neglect for filing late proofs of claims. The attorney was experiencing a significant disruption in his professional life and did not have access to his copy of the case file. This Court held that the attorney's inadvertent failure to file by the deadline constituted excusable neglect. *Id.* at 398-399.

The Second Circuit in *Silivanch*, *supra*, stated its position that "[i]n our cases addressing when neglect is excusable, we have therefore taken a hard line." *Id.* at 368. Its reasoning is set forth as follows:

> [T]he legal system would groan under the weight of a regimen of uncertainty in which time limitations are not rigorously enforced- -where every missed deadline was the occasion for the embarkation on extensive trial and appellate litigation to determine the equities of enforcing the bar.

This policy ignores this Court's mandate to weigh the equities and ignores the experience of the courts in being able to weigh equities in other circumstances, *e.g.*, whether to permit a party to amend a pleading after the time has passed to be able to amend automatically. Not only do parties such as Jin suffer injustice in being denied the opportunity to extend the time to appeal, but there is the injustice of the apparent availability of a remedy under FRAP 4(a)(5)- - which apparently every circuit court in the country has barred - - necessitating needless and stressful litigation before the inevitable denial is proclaimed.

The Second Circuit rule does not take into consideration the importance of the other factors utilized by this Court in granting relief in *Pioneer*, as follows:

> [T]he lack of any prejudice . . . or to the interests of efficient judicial

> administration, combined with the good faith of respondents and their counsel, weigh strongly in favor of permitting the tardy claim. *Id.* at 398

The relevant decisions of the Second Circuit, including the decision in this case, are against the language and purpose of Rule 4(a)(5) and the holding of *Pioneer*. This Court needs to clarify its holding in *Pioneer*.

POINT II

IT IS IMPORTANT FOR THIS COURT TO EXAMINE WHETHER DISCRETION SHOULD BE RESTORED TO THE LOWER COURTS UNDER CIRCUMSTANCES WHERE ALL CIRCUITS UNIVERSALLY DENY RELIEF FROM A NEGLIGENT LATE FILING

By universally denying motions to extend the time to appeal on grounds of negligent late filings of notices of appeals, all circuits have denied discretion to the lower courts to determine the circumstances under which to extend the time to file an appeal for excusable neglect, and the Supreme Court should determine whether such a denial of discretion to the district courts is proper.

In this case the Second Circuit observed as follows:

> We review a district court's order denying a motion to extend under Rule

> 4(a)(5) for abuse of discretion. . . [A]fter examining the record and the district court's reasoning, we cannot conclude that its application of the test for "excusable neglect" developed in *Pioneer*. . ., and adopted for purposes of deciding Rule 4(a)(5) motions in the *United States v. Hooper*, 9 F.3d 257, 259 (2d Cir. 1993), constituted an abuse of discretion. *Cf. Silivanch*, 333 F.3d at 368-369. *Min Jin v. Metropolitan Life Ins. Co.*, 88 Fed.Appx. 456 at 457.

However, since the Second Circuit has established a rule that a motion will "rarely if ever" be granted in the instance of a clear rule, it is obvious that the district court had no discretion whatsoever. Therefore, this case is an important one in order to determine if it is wise to so deprive district courts of their discretion.

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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No. 03-7662

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

MIN JIN,
Plaintiff-Appellant,

- v -

METROPOLITAN LIFE INSURANCE COMPANY,
Defendant-Appellee,

GREG MORABITO,
Defendant.

February 23, 2004, Filed

COUNSEL: Appearing for Appellant: PETER G. EIKENBERRY (Christina Lyons, on brief), New York, NY.

Appearing for Appellee: STEVEN E. OBUS, Proskauer Rose LLP, New York, NY.

JUDGES: PRESENT: HON. ROBERT D. SACK, HON. RICHARD C. WESLEY, Circuit Judges, HON. WILLIAM H. PAULEY III, * District Judge.

OPINION: SUMMARY ORDER

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the judgment of the district court be, and it hereby is, AFFIRMED.

Plaintiff-appellant Min Jin appeals from the district court's denial of her motion, pursuant to Federal Rule of Appellate Procedure 4(a)(5), for an extension of time to file a notice of appeal based upon "excusable neglect." Min Jin v. Metropolitan Life Ins. Co., No. 95 Civ. 4427(DFE), 2003 WL 21436211, 2003 U.S. Dist. LEXIS 10430 (S.D.N.Y. June 20, 2003). Jin's lawyer had filed the notice of appeal in question one day after the filing deadline prescribed by Fed. R. App. P. 4(a)(1). Jin moved for an extension of time to file notice of appeal on the grounds that upheavals in her lawyer's office, primarily relating to personnel and address changes, as well as Jin's asserted depressed state and inaccessibility by telephone, contributed to the delinquent filing.

We review a district court's order denying a motion to extend under Rule 4(a)(5) for abuse of discretion. Goode v. Winkler, 252 F.3d 242, 245 (2d Cir. 2001). While "we...have considerable sympathy for those who, through mistakes -- counsel's inadvertence or their own -- lose substantial rights in that way," Silivanch v. Celebrity Cruises, Inc., 333 F.3d 355, 367 (2d Cir. 2003), after examining the record and the district court's reasoning, we cannot conclude that its application of the test for "excusable neglect" developed in Pioneer Investment Services Co. v. Brunswick Associates Ltd. Partnership, 507 U.S. 380, 123 L. Ed. 2d 74, 113 S. Ct. 1489 (1993), and adopted for purposes of deciding Rule 4(a)(5) motions in United States v. Hooper, 9 F.3d 257, 259 (2d Cir. 1993), constituted an abuse of discretion. Cf. Silivanch, 333 F.3d at 368-69.

For the foregoing reasons, the judgment of the district court is hereby AFFIRMED.

* Of the United States District Court for the Southern District of New York, sitting by designation.

95 Civ. 4427 (DFE)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

MIN JIN,
Plaintiff,

- against -

METROPOLITAN LIFE INSURANCE CO.,
Defendant.

June 20, 2003, Decided
June 20, 2003, Filed

COUNSEL: For MIN JIN, plaintiff: Peter G. Eikenberry, New York, NY.

For METROPOLITAN LIFE INSURANCE CO., defendant: Allen I. Fagin, Proskauer Rose Goetz & Mendelsohn, NY, NY.

For GREG MORABITO, defendant: Jeffrey W. Pagano, King, Pagano & Harrison, New York, NY.

JUDGES: DOUGLAS F. EATON, United States Magistrate Judge.

OPINION BY: DOUGLAS F. EATON

OPINION:

OPINION AND ORDER

DOUGLAS F. EATON, United States Magistrate Judge.

Pursuant to Rule 4(a)(5) of the Federal Rules of Appellate Procedure, plaintiff Min Jin has made a timely motion for a retroactive extension of time to file a Notice of Appeal from the judgment entered in favor of defendant Metropolitan Life Insurance Company ("MetLife").

Ms. Jin's motion is supported by an Affidavit from her counsel, Peter G. Eikenberry, dated May 16, 2003, and its annexed Exhibits 1 through 3. I will refer to certain of those exhibits as "Exh.." On May 22, MetLife submitted an opposing memorandum of law and the Declaration of its counsel, Steven E. Obus ("Obus Decl."). On May 23, Mr. Eikenberry submitted a reply.

For the reasons stated below, I deny the motion for extension of time.

BACKGROUND

Ms. Jin suffers from depression and is receiving Social Security disability benefits. Mr. Eikenberry has served as Ms. Jin's attorney throughout two appeals and two trials in this case. At the second trial, the jury rejected Ms. Jin's allegations and returned a verdict in favor of MetLife on March 14, 2003. On March 20, I signed the Judgment dismissing the complaint, and I mailed a copy to both attorneys. The docket clerk entered the Judgment on the docket on March 25, and also mailed a copy to both attorneys, along with a detailed form letter about the right to appeal. (Exh. 2, two pages.) On plaintiff's copy of the Judgment, a person (presumably

Mr. Eikenberry or someone in his office) wrote "Note & File" and circled the stamped notice, which read: "THIS DOCUMENT WAS ENTERED ON THE DOCKET ON 3/25/03." The accompanying form letter from the docket clerk cited Rule 4(a)(l) of the Federal Rules of Appellate Procedure, and made clear that any party wishing to file a Notice of Appeal was required to do so within 30 days of the entry of the Judgment. Since March has 31 days, the deadline for plaintiff to file a Notice of Appeal was April 24. (Mr. Eikenberry does not contend that he forgot that March has 31 days.)

Mr. Eikenberry and his office failed to calendar the deadline. He explains:

A number of circumstances combined to interfere with the more or less smooth operation of my office during this period and in particular the handling of the calendaring of a notice of appeal date as follows:

a. I moved my offices from 63 Wall Street to 74 Trinity Place commencing on Friday, March 21, 2003, and

b. The move was not completed until Thursday March 27, and

c. On March 25, I terminated my secretary and a new secretary commenced on March 26, and

d. My associate Lisa Brubach resigned to accept another position and left on April 15, and

e. I had several deadlines the week of April 21 including an important letter hand delivered to Judge Carter on April 21, an appeal brief filed on April 23 and a post hearing arbitration brief filed on April 25, and

f. The files were not appropriately arranged until at least the end of April.

(Eikenberry Aff. P 8.) He goes on to say that, despite these problems, he would normally have filed on time, but Ms. Jin was "not easy to reach" and took a long time before "making the decision to appeal." (*Id.* at PP 9-22, esp. 9, 21, and 22.) It is unclear exactly when she communicated her decision to him.

On April 25 (and perhaps earlier), he attempted to locate his copy of the Judgment, and could not find it. He relied solely on his memory on April 25 when he prepared the Notice of Appeal, in which he erroneously wrote that the Judgment had been entered on "March 28, 2003." (*Id.* at P 4.)

A few days later, he realized his mistake and, if I may use the parlance of golf, he called the penalty on himself. This is a recent example of the candor and civility displayed by both Mr. Eikenberry and Mr. Obus throughout their involvement in this lengthy litigation. Even though the clerk's office had accepted and docketed the Notice of Appeal, Mr. Eikenberry telephoned Mr. Obus on April 30 and informed him that the Notice of Appeal had been filed one day late. He asked if MetLife would consent to the late filing; on the next day, Mr. Obus advised him that MetLife would not consent. (Obus Decl. P 3.)

On May 29, the Clerk of the Court of Appeals filed a dismissal of Ms. Jin's appeal, because she had failed to file the required papers within 10 days after filing the Notice of Appeal. This has no effect on my decision whether to grant or deny the pending motion. The

Court of Appeals was apparently unaware that the Notice was untimely, and unaware that the plaintiff had a motion pending before me.

DISCUSSION

The deadline for filing a Notice of Appeal is "mandatory and jurisdictional." *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 61, 103 S. Ct. 400, 403, 74 L. Ed. 2d 225 (1982) (per curiam); Rezzonico v. H & R Block, Inc., 182 F.3d 144, 150 (2d Cir. 1999). Rule 4(a)(5) of the Federal Rules of Appellate Procedure provides that:

The district court may extend the time to file a notice of appeal if (i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and (ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

The Advisory Committee Notes for the 2002 Amendments to Rule 4 explain that "excusable neglect" and "good cause" are distinctly different standards:

The excusable neglect standard applies in situations in which there is fault; in such situations, the need for an extension is usually occasioned by something within the control of the movant. The good cause standard applies in situations in which there is no fault -- excusable or otherwise. In such situations, the need for an extension is usually occasioned by something that is not within the control of the movant.

Advisory Committee Notes to Fed. R. App. P. 4, Subdivision (a)(5)(A)(ii), 2002 Amendments.

In the present motion before me, it appears to be undisputed that the governing standard is "excusable neglect" rather than "good cause." The failure to file a timely notice of appeal was not occasioned by anything beyond the control of Ms. Jin or Mr. Eikenberry. (I note that I do not fault plaintiff for taking more than two weeks to prepare and file her motion; May 16 was well within Rule 4(a)(5)'s 30-day grace period for filing such a motion.)

The phrase "excusable neglect" also appears in Bankruptcy Rule 9006(b)(l), which empowers a bankruptcy court to permit a late filing if the failure to comply with a deadline "was the result of excusable neglect." In that context, the Supreme Court stated in 1993 that the "excusable neglect" standard is "an equitable one, taking account of all relevant circumstances surrounding the party's omission." *Pioneer Investment Services Company v. Brunswick Associated Limited Partnership*, 507 U.S. 380, 395, 113 S. Ct. 1489, 1498, 123 L. Ed. 2d 74 (1993). I find it significant that the Supreme Court said "we give little weight to the fact that counsel was experiencing upheaval in his law practice." *Id.*, 507 U.S. at 398, 113 S. Ct. at 1499. *Pioneer* listed four factors that a court must consider before ruling on a claim of "excusable neglect":

[1] the danger of prejudice to the [non-movant], [2] the length of the delay and its potential impact on judicial proceedings, [3] the reason for the delay, including whether it was within the reasonable control of the

movant, and [4] whether the movant acted in good faith.

Id. (emphasis added). The Second Circuit applies the Pioneer factors to Rule 4(a)(5) of the Federal Rules of Appellate Procedure. *United States v. Carson*, 52 F.3d 1173, 1180 (2d Cir. 1995).

Of the four Pioneer factors, the first, second, and fourth weigh in favor of plaintiff. I see no danger of prejudice to MetLife. The length of the delay was minimal, and would not have any appreciable impact on judicial proceedings. Nothing suggests that either Ms. Jin or Mr. Eikenberry acted other than in good faith. However, the fact that the Notice of Appeal was only one day late does not in and of itself constitute excusable neglect. *See, e.g., Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 464 (8th Cir.), *cert. denied*, 531 U.S. 929, 148 L. Ed. 2d 248, 121 S. Ct. 309 (2000).

The third *Pioneer* factor is often the most important -- "the reason for the delay, including whether it was within the reasonable control of the movant." *Weinstock v. Cleary, Gottlieb, Steen, & Hamilton*, 16 F.3d 501, 503 (2d Cir. 1994); *Active Glass Corp. v. Architect & Ornamental Iron Workers Local*, 899 F. Supp. 1228, 1231 (S.D.N.Y. 1995) (Leisure, J.); *Mason v. Schriver*, 1998 U.S. Dist. LEXIS 10585, 1999 WL 498221, *2-3 (S.D.N.Y., July 13, 1999) (Preska, J.). The Eighth Circuit has said: "The four *Pioneer* factors do not carry equal weight; the excuse given for the late filing must have the greatest import." *Lowry*, 211 F.3d at 463. *Lowry* was cited by the First Circuit in the following passage:

Although the *Pioneer* standard is more forgiving than the standard in our prior case law, there still must be a satisfactory explanation for the late filing. We have observed that "'... while prejudice, length of delay, and good faith might have more relevance in a closer case, the reason-for-delay factor will always be critical to the inquiry ....'" Hospital del Maestro v. NLRB 263 F.3d 173, 175 [(1st Cir. 2001)] (quoting *Lowry v. McDonnell Douglas Corp.*, 211 F.3d 457, 463 (8th Cir. 2000)). This focus comports with the *Pioneer* Court's recognition that "inadvertence, ignorance of the rules, or mistakes construing the rules do not usually constitute 'excusable' neglect." 507 U.S. at 392, 113 S. Ct. at 1496.

Graphic Communications Int'l Union, Local 12-N v. Quebecor Printing Providence, Inc., 270 F.3d 1, 5-6 (1st Cir. 2001).

Mr. Eikenberry's affidavit offers two reasons for the delay. (1) He was changing secretaries and moving to a different building; in those circumstances he failed to calendar the appeal deadline, and he was unable to put his hands on the copies of the Judgment mailed to him by me and by the docket clerk. (Eikenberry Aff. P 4-8.) (2) He and Ms. Jin had difficulty reaching a decision whether or not to appeal. The difficulty was both substantive and "procedural" -- "Ms. Jin is not easy to reach; she does not have a telephone and will only call sometime after receiving an email from [her attorney]." (*Id.* PP 21-22.) After receiving Mr. Obus's May 22 discussion of the case law, Mr. Eikenberry placed more emphasis on the second reason. (5/23/03 Reply, p. 2.)

I find the first reason to be inadequate. Mr. Eikenberry knew that his consultations with his client were

bringing him "to the wire." *Ibid.* He knew that he was unable to put his hands on the copies of the Judgment, which he knew had been entered sometime after the March 14 jury verdict. He could have easily verified the date of the entry by contacting the Clerk's office or by contacting Mr. Obus or the other attorneys at Proskauer Rose, LLP.

Pioneer was a 5-4 decision, and it turned on a factor not present in Ms. Jin's case -- there was "a 'dramatic ambiguity' in the notification" that triggered the deadline. 507 U.S. at 398, 113 S. Ct. at 1500. The Second Circuit has said that, where the deadline is unambiguous, "we continue to expect that a party claiming excusable neglect will, in the ordinary course, lose under the *Pioneer* test." *Canfield v. Van Atta Buick/GMC Truck, Inc.*, 127 F.3d 248, 251 (2d Cir. 1997).

In *Worthy v. General Longshoremen's Workers Int'l*, 2003 U.S. Dist. LEXIS 1678, 2003 WL 260520 (E.D.La., Feb. 4, 2003), the Notice of Appeal was one day late because counsel erroneously excluded legal holidays when computing the 30-day period. Judge Vance ruled that this was "a garden variety mistake," and she denied the motion for extension. 2003 U.S. Dist. LEXIS 1678, [WL] at *2. In an even more recent case, *Villa v. Village of Elmore*, 252 F. Supp.2d 492 (N.D.Ohio 2003), the judgment was entered on December 3, 2002, and the Notice of Appeal was filed on January 3, 2003, one day late. Judge Carr denied a timely motion for a retroactive extension, and wrote: "Miscalculation of the time period does not rise ... to the standard of excusable neglect." *Id.* at 494.

Earlier this year, Judge Kaplan and I denied a two-day extension in a case which was more sympathetic than Ms. Jin's, *Dix v. Saks, Inc.*, 2003 WL 194210 (S.D.N.Y., Jan. 19, 2003) (a *pro se* employment discrimination case). Ms. Dix received, on June 19, 2002, a right-to-sue letter from the U.S. Equal Employment Opportunity Commission, which warned her: "Your lawsuit must be filed WITHIN 90 DAYS from your receipt of this Notice." *Id.* at *1. She neglected to note that July and August have 31 days, and that her deadline was therefore September 17. She filed her complaint on September 19. Adopting my recommendation, Judge Kaplan dismissed her complaint on the ground that it was not timely filed. *Dix v. Saks, Inc.*, 2003 WL 21223289 (S.D.N.Y., May 22, 2003).

The arguments for extension are less persuasive in Ms. Jin's case than they were in *Dix*. First, Ms. Dix was a pro *se* litigant. Second, she equated 90 days with three months, an understandable mistake for a non-lawyer. Third, the deadline in *Dix* marked the running of a statute of limitations and thus was eligible for equitable tolling, whereas the 30-day deadline for filing a notice of appeal is "mandatory and jurisdictional." *Griggs*, 459 U.S. at 61, 103 S. Ct. at 403; *Rezzonico*, 182 F.3d at 150.

I turn now to plaintiff's second reason -- Ms. Jin's indecision in deciding whether to appeal, and her delays in communicating with her attorney. Mr. Eikenberry's May 23 letter, at page 2, says that missing the deadline "was as much or more related to the dynamics of [his] necessary consultations [he] had with Ms. Jin -- as it had to do with any office conditions." In many cases it is difficult to decide whether to appeal. That difficulty has not been recognized as a factor in "excusable neglect."

See, e.g., Smith v. Lehigh Valley R. Co., 174 F.2d 592 (2d Cir. 1949) (appeal dismissed where Notice of Appeal was not filed within 30 days, although delay was due to indecision as to whether appeal should be taken).

Mr. Eikenberry says that the late filing was his fault, and that he "was obviously responsible for the neglect in not filing timely." (Eikenberry Aff. P 26.) But I find that part of the blame ought to be placed on Ms. Jin personally. Her practice of communicating with her lawyer only by e-mail, and not always promptly, exacerbated the delays caused by her uncertainty about whether she wanted to appeal.

In any event, *Pioneer* says:

... In *Link v. Wabash R. Co.*, 370 U.S. 626, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962), we held that a client may be made to suffer the consequence of dismissal of its lawsuit because of its attorney's failure to attend a scheduled pretrial conference. In so concluding, we found "no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client." Id., at 633, 82 S. Ct., at 1390. To the contrary, the Court wrote:

"Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each party is deemed bound by the acts of his lawyer-agent and is considered to have 'notice of all facts, notice of which can be charged upon the attorney.'" *Id.*, at 633-634, 82 S. Ct., at 1390

(quoting *Smith v. Ayer*, 101 U.S. 320, 326, 25 L. Ed. 955 (1880)).

... This principle applies with equal force here and requires that respondents be held accountable for the acts and omissions of their chosen counsel. Consequently, in determining whether respondents' failure to file their proofs of claim prior to the bar date was excusable, the proper focus is upon whether the neglect of respondents *and their counsel* was excusable.

Pioneer, 507 U.S. at 396-97, 113 S. Ct. at 1499 (emphasis in the original). In *Garcia-Warner v. Delta Air Lines, Inc.*, No. 96 Civ. 844, 1998 U.S. Dist. LEXIS 17981 (E.D.N.Y. Oct. 28, 1998), Judge Raggi, when she was a District Judge, denied an extension where the Notice of Appeal was apparently four days late. She wrote: "The conduct of an attorney is normally imputed to the client." 1998 U.S. Dist. LEXIS 17981, [WL] at *8.

I close by repeating that Ms. Jin was personally responsible for failing to communicate a firm decision to appeal well before the deadline. I realize that she suffers from depression, but she must have been a difficult client. (On the eve of the first trial, she dramatically changed her testimony and revealed new witnesses.) She is in no position to find fault with Mr. Eikenberry, who gave her devoted representation for more than three years.

CONCLUSION

For the reasons stated above, I deny Ms. Jin's motion for extension of time to file a Notice of Appeal. I am

returning, by mail, Mr. Eikenberry's check for the fee for the proposed new Notice of Appeal.

DOUGLAS F. EATON

United States Magistrate Judge

Dated: New York, New York

June 20, 2003

Federal Rules of Appellate Procedure Rule 4, 28 U.S.C.A.

Rule 4. Appeal as of Right--When Taken

(a) Appeal in a Civil Case.

(1) Time for Filing a Notice of Appeal.

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

(B) When the United States or its officer or agency is a party, the notice of appeal may be filed by any party within 60 days after the judgment or order appealed from is entered.

(C) An appeal from an order granting or denying an application for a writ of error coram nobis is an appeal in a civil case for purposes of Rule 4(a).

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision or order--but before the entry of the judgment or order--

is treated as filed on the date of and after the entry.

(3) Multiple Appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) Effect of a Motion on a Notice of Appeal.

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for

all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 10 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment--but before it disposes of any motion listed in Rule 4(a)(4)(A)--the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment altered or amended upon such a motion, must file a notice of appeal, or an amended notice of appeal--in compliance with Rule 3(c)--within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(5) Motion for Extension of Time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and
(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 10 days after the date when the order granting the motion is entered, whichever is later.

(6) Reopening the Time to File an Appeal. The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the motion is filed within 180 days after the judgment or order is entered or within 7 days after the moving party receives notice of the entry, whichever is earlier;

(B) the court finds that the moving party was entitled to notice of the entry of the judgment or order sought to be appealed but did not receive the notice from the district court or any party within 21 days after entry; and

(C) the court finds that no party would be prejudiced.

(7) Entry Defined.

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58(a)(1) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a); or

(ii) if Federal Rule of Civil Procedure 58(a)(1) requires a separate document, when the judgment or order is entered in the civil docket under

Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

- the judgment or order is set forth on a separate document, or
- 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79(a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58(a)(1) does not affect the validity of an appeal from that judgment or order.

(b) Appeal in a Criminal Case.

(1) Time for Filing a Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed in the district court within 10 days after the later of:

(i) the entry of either the judgment or the order being appealed; or

(ii) the filing of the government's notice of appeal.

(B) When the government is entitled to appeal, its notice of appeal must be filed in the district court within 30 days after the later of:

(i) the entry of the judgment or order being appealed; or

(ii) the filing of a notice of appeal by any defendant.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the court announces a decision, sentence, or order--but before the entry of the judgment or order--is treated as filed on the date of and after the entry.

(3) Effect of a Motion on a Notice of Appeal.

(A) If a defendant timely makes any of the following motions under the Federal Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 10 days after the entry of the order disposing of the last such remaining motion, or within 10 days after the entry of the judgment of conviction, whichever period ends later. This provision applies to a timely motion:

(i) for judgment of acquittal under Rule 29;

(ii) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 10 days after the entry of the judgment; or

(iii) for arrest of judgment under Rule 34.

(B) A notice of appeal filed after the court announces a decision, sentence, or order--but before it disposes of any of the motions referred to in Rule 4(b)(3)(A)--becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion; or

(ii) the entry of the judgment of conviction.

(C) A valid notice of appeal is effective--without amendment--to appeal from an order disposing of any of the motions referred to in Rule 4(b)(3)(A).

(4) Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the district court may--before or after the time has expired, with or without motion and notice--extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this Rule 4(b).

(5) Jurisdiction. The filing of a notice of appeal under this Rule 4(b) does not divest a district court of jurisdiction to correct a sentence under Federal Rule of Criminal Procedure 35(a), nor does the filing of a motion under 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under Federal Rule of Criminal Procedure 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry Defined. A judgment or order is entered for purposes of this Rule 4(b) when it is entered on the criminal docket.

(c) Appeal by an Inmate Confined in an Institution.

(1) If an inmate confined in an institution files a notice of appeal in either
a civil or a criminal case, the notice is timely if it is deposited in the institution's internal mail system on or before the last day for filing. If an institution has a system designed for legal mail, the inmate must use that system to receive the benefit of this rule. Timely filing may be shown by a declaration in compliance with 28 U.S.C. § 1746 or by a notarized statement, either of which must set forth the date of deposit and state that first-class postage has been prepaid.

(2) If an inmate files the first notice of appeal in a civil case under this Rule 4(c), the 14-day period provided in Rule 4(a)(3) for another party to file a notice of appeal runs from the date when the district court dockets the first notice.

(3) When a defendant in a criminal case files a notice of appeal under this Rule 4(c), the 30-day period for the government to file its notice of appeal runs from the entry of the judgment or order appealed from or from the district court's docketing of the defendant's notice of appeal, whichever is later.

(d) Mistaken Filing in the Court of Appeals. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the court of appeals, the clerk of that court must note on the notice the date when it was received and send it to the district clerk. The notice is then considered filed in the district court on the date so noted.

CREDIT(S)

(As amended Apr. 30, 1979, eff. Aug. 1, 1979; Nov. 18, 1988, Pub.L. 100- 690, Title VII, § 7111, 102 Stat. 4419; Apr. 30, 1991, eff. Dec. 1, 1991; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 27, 1995, eff. Dec. 1, 1995; Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002.)

ADVISORY COMMITTEE NOTES

1967 Adoption

28 U.S.C. Section 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

95 Civ. 4427

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MIN JIN,
Plaintiff,

v.

METROPOLITAN LIFE INSURANCE COMPANY
Defendant.

STATE OF NEW YORK)
)SS.:
COUNTY OF NEW YORK)

AFFIDAVIT

PETER EIKENBERRY, being dually sworn, says:

1. I am a member of this Court and I make this affidavit in support of plaintiff Jin's motion for an extension of time to file Jin's notice of appeal based on excusable neglect.

2. On April 25, 2003, I filed a notice of appeal (See copy attached as Ex. 1) on behalf of Jin - - which dates was 31 days after the date, March 25, 2003, that the judgment appealed from was entered into the docket.

3. The notice of appeal I filed stated that the judgment was entered on March 28, 2003. (Ex. 1.)

4. The March 28, 2003 date was taken from my memory because I could not locate a copy of the judgment in my office on April 25.

5. Under the usual circumstances when the judgment was received in my office, it would have been calendared by my associate and the caldendaring verified by my secretary.

6. The judgment was entered in to the docket March 25, 2003 (a copy which is attached hereto as Exhibit 2) and after it was docketed it was mailed to me at 63 Wall Street on March 26, 2003 and forwarded thereafter to me at 74 Trinity Place.

7. The notice of appeal date was not calendered.

8. A number of circumstances combined to interfere with the more or less smooth operation of my office during this period and in particular the handling of the calendaring of a notice of appeal date as follows:

a. I moved my offices from 63 Wall Street to 74 Trinity Place commencing on Friday, March 21, 2003 and

b. The move was not completed until Thursday March 27, and

c. On March 25, I terminated my secretary and a new secretary commenced on March 26, and

d. My associate Lisa Brubach resigned to accept another position and left on April 15, and

e. I had several deadlines the week of April 21 including an important letter hand delivered to Judge Carter on April 21, and appeal brief filed on April 23 and a post hearing arbitration brief filed on April 25, and

f. The files were not appropriately arranged until at least the end of April.

9. Normally the filing of the notice of appeal would have been routinely accomplished well in advance of the deadline despite the above type problems.

10. This is not a normal situation and arises out of circumstances going back to the date of my retention as an attorney by Jin.

11. Min Jin came to me in late summer/early fall of 1999 after her counsel had resigned; she reported that he had said - - after MetLife had substituted in Proskauer Rose for prior counsel – that he was "small potatoes" compared to Proskauer and did not want to litigate against them.

12. At the time she had a relatively short and mandatory timetable for filing of a pretrial order and for trial.

13. Jin was unemployed and, according to my observation, borderline suicidal, but she did not have a lawyer, she had a good case, and I thought that I could work with her.

14. Therefore, I took the case despite the fact that I was commencing a long trial expected to last for at least a month or two (but which lasted six months.)

15. Thereafter, on Jin's behalf, inter alia, I defended an appeal on the issue of compelling arbitration, conducted by a jury trial, prevailed upon an appeal and conducted a second jury trial over the course of 3½ years - - including upon request of the Circuit - - writing two extra briefs during the last appeal.

16. The decision to file a new notice of appeal in April 2003 was not an easy one, and required thought, research and discussion between Ms. Jin and me.

17. By the end of the second trial, I felt that my resources had been stretched but that I had nevertheless provided Jin with first class representation and I had had a good professional experience.

18. Jin, on the other hand, had improved her outlook at least up until the beginning of the first trial, and was still in better mental condition than when I first met her.

19. Upon reflection and research, I came to believe that she had sound grounds for an appeal with respect to the conduct of the second trial at least as to the following issues:

a. Should Jin have been deprived of the preclusive effect of the favorable result of the first trial jury finding that Jin's MetLife supervisor had sexually harassed her and

subjected her to a hostile work environment? and

b. Should the evidence - - that MetLife had not disciplined her supervisor after the first jury had found that he sexually harassed her - - have been excluded from consideration by the second jury?

20. At the end of the day it was my responsibility to handle the appeal if she determined that she wished to appeal if I believed that she had grounds.

21. Thus, Jin and I had to make a decision together as to whether to go forward with an other appeal when she had already been through the ordeal of two jury trials and two appeals.

22. Ms. Jin is not easy to reach; she does not have a telephone and will only call sometime after receiving an email from me.

23. I undertook this case in large part to assist a pro se litigant with immediate and significant deadlines.

24. I also served the Court in filing extra briefs at the appellate and trials without any significant delay cause by us.

25. There is no prejudice to MetLife if the Court should grant a relatively short extension of the filing deadline and the interests of justice will be served by permitting this client to have her full day in court.

26. Therefore, although I was obviously responsible for the neglect in not filing timely, I ask this Court to find that it was excusable, and that I be permitted to file the notice of appeal that is attached hereto as Exhibit 3.

Wherefore, it is respectfully requested that Jin's motion for an extension of time to file an appeal be granted.

/s/
PETER G. EIKENBERRY (7257)

Sworn before me this
16th day of May 2003
/s/
NOTARY PUBLIC

EARLE R. TOCKMAN
Notary Public, State of New York
No. 02TO4848708
Qualified in Kings County
Commission Expires November 30, 2005